United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1404

To be argued by
ALAN LEVINE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1404

B P/S

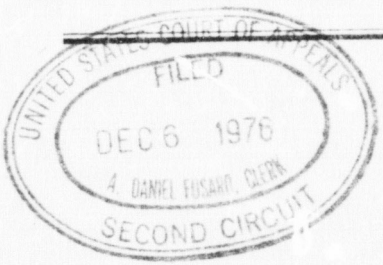
UNITED STATES OF AMERICA,
Appellee,

—v.—

HERBERT KAMINSKY, HARRY LEVINE BENSON and MARI-ANN DANISE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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Preliminary Statement

Herbert Kaminsky, Harry Levine Benson and Mari-Ann Danise appeal from judgments of conviction entered on June 2, 1976, in the United States District Court for the Southern District of New York, after a six-day trial before the Honorable Charles E. Tenney, United States District Judge, and a jury.

Indictment 75 Cr. 538 was filed in three counts on June 5, 1975. Count One charged the three defendants with having devised a conspiracy to defraud an individual of property, to wit, a 9.88 karat diamond and an 8.35 karat emerald, in violation of Title 18, United States Code, Section 371. Count Two charged the three defendants with the use of a wire communication in interstate

and foreign commerce in the execution of the scheme to defraud, in violation of Title 18, United States Code, Section 1343. Count Three charged the three defendants with inducing an individual to travel in interstate and foreign commerce in the execution of the scheme to defraud, in violation of Title 18, United States Code, Section 2314.

Trial commenced on May 24, 1976. On June 2, 1976 the jury returned a verdict of guilty on all counts with respect to defendants Kaminsky and Benson. With respect to the defendant Danise, the jury returned a verdict of guilty on Counts Two and Three and reported that it was unable to reach a verdict on Count One. Judge Tenney discharged the jury, declaring a mistrial on Count One as to Danise.

On August 25, 1976 defendant Kaminsky was sentenced to three years imprisonment on Counts One and Two and to a five year term of imprisonment on Count Three; execution of sentence was suspended as to Counts One and Two, with the defendant placed on probation for three years to commence following the expiration of the term of confinement on Count Three. Defendant Benson was sentenced to three years imprisonment on Counts One and Two and a four year term of imprisonment on Count Three; execution of sentence was suspended as to Counts One and Two and the defendant was placed on probation for three years to commence upon his release from his term of confinement on Count Three. Danise was sentenced to three years imprisonment on each of Counts Two and Three; execution of sentence was suspended and the defendant was placed on probation for four years.

Kaminsky is presently serving his sentence and Benson has been enlarged on bail pending appeal.

Statement of Facts

A. The Government's Case

The proof at trial showed that in late December, 1974, Kaminsky, Benson and Danise defrauded Hans Buhler, a Swiss diamond merchant, of two precious stones, a 9.88 karat diamond and an 8.35 karat emerald, which together were valued at more than $200,000. The scheme itself was quite simple. Kaminsky and Danise obtained from Buhler the 9.88 karat diamond in New York for the purported purpose of appraising and showing it. When he gave Kaminsky and Danise the diamond, Buhler received in exchange a cash memorandum receipt.* Later Kaminsky introduced Benson as the buyer of the diamond and then obtained the 8.35 karat emerald as a commission for the sale. Thereafter, Kaminsky, Benson and Danise led Buhler during a two week escapade to Chicago, London, Zurich, New York and Las Vegas as Buhler tried, without success, to consummate the sale or to recover his precious stones.

1. Background

In early December, 1974, Buhler travelled to Los Angeles with a 9.88 karat diamond, an 8.35 karat emerald and two other precious stones seeking a qualitative grading of the diamond at the Gemological Institute of

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* As Buhler, and another witness, Joseph Banda, testified it is the custom in the diamond industry to transfer precious stones prior to actual sale in exchange for a cash memorandum in order to give the agent or prospective purchaser an opportunity to appraise the merchandise. (Tr. 135, 649).

America ("GIA") there.* (Tr. 123, 126, 427, 500-01; GX 7).** The diamond received the second highest color grading, Color E. (Tr. 127, 501; GX 8). Upon completing his business in Los Angeles, Buhler stopped in New York on his way home to Zurich. (Tr. 127; GX 9). It was here that his troubles began.

2. The Scheme Begins: Buhler meets Kaminsky, Benson and Danise in New York

Shortly after his arrival in New York, Buhler received a telephone call from his Swiss broker, Hans Furer (Tr. 130), and as a result of that call Buhler went up to the business office of Mari-Ann Danise on 39th Street to present the 9.88 karat diamond for sale. (Tr. 130-31). Danise introduced herself and a man named "Herbie," who was identified as defendant Herbert Kaminsky. (Tr. 132). Immediately, Kaminsky hustled Buhler into a side room and inquired about the 9.88 karat diamond. (Tr. 133). Unwilling to expose such a valuable stone without

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* Buhler declared the precious stones for export purposes upon leaving Zurich, Switzerland. (Tr. 123; GX 6). However, he failed to declare the precious stones upon entering the United States. (Tr. 419-22, 663-64).

Buhler had purchased the 9.88 karat diamond in June, 1974 from a private party through a retail store in Zurich owned by one Werner Barth (Tr. 331; GX 4), and the 8.35 karat emerald in October, 1974 from Kuthari Brothers in Bombay, India. (Tr. 122, 337-39).

In June, after purchasing the diamond, Buhler brought it to the GIA in New York for grading. Robert Crowningschield, its director, testified that the diamond had received the third highest color grading, Color F. (Tr. 98, 102; GX 1, 2).

** "Tr." refers to trial transcript; "GX" refers to Government Exhibit; "DX" refers to Defense Exhibits; "App." refers to Appellants' Appendix; "Br." refers to the brief of the specified appellant.

knowing more about his potential customers, Buhler initially denied having it in his possession. (Tr. 133). After conversation about Danise's wealth and business, Buhler telephoned Zurich and inquired whether the precious stone could be safely shown to Kaminsky. (Tr. 134). Confident he was dealing with legitimate business people, Buhler then presented the 9.88 karat diamond and the two GIA certificates to Herbie. (Tr. 134). Not surprisingly, Kaminsky admired the diamond and requested an opportunity to show it to an appraiser and to a potential buyer. (Tr. 134).

Following another conversation with Zurich, Buhler agreed to give Kaminsky the 9.88 karat diamond, but requested a cash memorandum receipt in exchange. (Tr. 137). Although Kaminsky was initiallly insulted by Buhler's request, he reluctantly gave him a signed receipt which stated: "Good for one diamond, 9.88." Buhler stated his price was $20,000 per karat. (Tr. 138). Kaminsky departed and that is the last Buhler saw of his 9.88 karat diamond.

After Kaminsky left the office Danise told Buhler that Kaminsky's full name was "Herbie Key." (Tr. 139). Fifteen minutes later Kaminsky telephoned Danise's office and bargained Buhler's price for the diamond down to $19,800 per karat. (Tr. 139). After another fifteen minutes passed Kaminsky called announcing to Buhler the diamond was sold for $22,800 per karat and that the $3,000 per karat difference was to be Kaminsky's commission. (Tr. 140).

A very short time passed and Kaminsky appeared with the purported purchaser who was introduced to Buhler as Harry Levine, later identified as the defendant Harry Levine Benson. (Tr. 141). Buhler sought to have the diamond returned until he received the money, but

Kaminsky told him it had been deposited in a safe for safekeeping. (Tr. 141). Kaminsky and Benson then told Buhler that the cash was not available in New York and that he would have to go with Benson to Chicago that day to obtain it. (Tr. 142). Kaminsky persuaded Buhler to give him the 8.35 karat emerald in payment for Kaminsky's $30,000 commission on the sale of the diamond. (Tr. 144). Buhler foolishly complied and that is the last Buhler saw of the 8.35 karat emerald.

3. Chicago—The Plot Thickens

Benson and Buhler shared a taxi to the airport and caught a flight to Chicago. During the trip, Benson explained to Buhler that his money was in a bank safe which had two keys and that he would contact his business associate with the other key on the following morning. (Tr. 159-60). In conversation Buhler related his plans to spend the Christmas holiday with his fiance's family in London. (Tr. 156).

At breakfast the following morning, December 24, 1974, Benson claimed to be unable to contact his business associate to get the money. (Tr. 166). Benson then suggested that since Buhler's Christmas plans included London, Buhler could pick up his money from a Mr. Fitzsimmons in London's Colony Club. (Tr. 166, 171). Aggravated and suspicious of a swindle, Buhler demanded another receipt that included the 8.35 karat emerald. (Tr. 167). Benson refused to write the receipt and insisted the receipt should only state the amount owing. (Tr. 167). Buhler then wrote a brief receipt stating he was owed $255,000 and Benson signed it. (Tr. 167-69; GX 13). Benson asked for the other receipt back and later that morning in the hotel room, Benson flushed it down the toilet. (Tr. 171, 173). While in the hotel

room with Benson, Buhler telephoned Kaminsky and Danise at Danise's office in New York. (Tr. 172). After being told of Benson's change in plans Kaminsky assured Buhler that the money would be available and that he should return first to New York. (Tr. 172). Shortly thereafter Benson and Buhler departed company and Buhler flew to New York. (Tr. 175).

4. The Transatlantic Search: New York-London-Zurich-New York

Upon his arrival Buhler went straight to Danise's office where he met Kaminsky and Danise. (Tr. 175). Buhler threatened to go to the police, but Kaminsky talked him out of it assuring him the money would be available in London. During this time a telegram from Benson arrived which explained that, contrary to Benson's prior instructions, Buhler should contact instead a David Gray at the Sportsman's Club in London. (Tr. 177). Buhler then flew to London and checked into the West Lodge Park Hotel. (GX 15, 16).

Buhler finally reached David Gray at the Sportsman's Club, but he neither knew Benson nor had any money available for Buhler. (Tr. 179). Furious, Buhler telephoned Danise at her Connecticut home who told him to call back and she would take care of the situation. (Tr. 180). Shortly thereafter, Buhler received a call from Benson who claimed to be in London, although Buhler testified that it sounded like a long distance call. (Tr. 180). Benson told Buhler that he had $60,000 cash with him, would pick up the remainder in Rome and meet Buhler in Zurich. (Tr. 181). On December 28, 1974, Buhler returned to Zurich, but Benson never appeared.

Once in Zurich, Buhler met with James Brito, a business associate of Danise's and his attorney, Herbert

Sachs.* Together they telephoned Danise to explain the predicament. (Tr. 182). She guaranteed payment of the money, which she said was available in New York. (Tr. 182). During the next several days numerous phone calls were made between Buhler and Sachs in Zurich and Danise and Kaminsky in New York. Plans to deposit the money in a New York bank and plans to pick up the money in New York were suggested by Buhler and Sachs and squelched by Kaminsky and Danise. A trip by Danise to Zurich to bring the money was arranged and cancelled. (Tr. 183, 535, 538-48). Finally on New Year's Day 1975 Danise assured Buhler that if he came to New York she would pay him the $255,000. (Tr. 186, 547).

Buhler arrived in New York, but Danise avoided payment of the money by saying that it was after 5 P.M. and the money, locked in a safe, was unavailable. (Tr. 192). The following morning Buhler met Kaminsky and Danise at her office only to find no money available. (Tr. 193). Benson then telephoned Danise's office with a message that he was in Las Vegas and that the precious stones were being held as collateral for a $132,000 gambling debt. (Tr. 193). After the conversation Buhler once again threatened to go to the Federal Bureau of Investigation, but was dissuaded from doing so when Kaminsky and Danise gave him a written guarantee promising payment of $225,000 in exchange for the 9.88 karat diamond and the 8.35 karat emerald. (Tr. 194-95;

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* Brito shared office space with Danise in New York, (Tr. 548), and was in Zurich seeking import-export business. It had been Brito who initially had contacted Buhler's broker, Furer, on behalf of Danise to arrange for the sale of diamonds. Apparently after Buhler conveyed the precious stones to Benson, Brito and Furer entered into an agreement for commissions without Buhler's knowledge. (Tr. 559; DX E).

GX 20). That guarantee provided for an initial payment of $50,000. On January 4, 1975, Buhler went to Danise's office to get the initial $50,000. He was told that the money was not available. (Tr. 196-97). While he was there, Benson telephoned Danise's office and told Buhler that $60,000 was available in Las Vegas and that Kaminsky would make arrangements for additional monies. (Tr. 197). Kaminsky, forever trying to hustle Buhler out of money, asked Buhler if he would put up additional money to recover the precious stones from the casino. Buhler offered several Swiss trading checks which Kaminsky refused. (Tr. 197). Danise then agreed to pay Buhler's airplane fare to Las Vegas. (Tr. 202).

5. The Last Stretch—Las Vegas

Buhler flew to Las Vegas and made arrangements with Benson to meet at the Dunes Hotel casino.* (Tr. 205). Benson later delayed the appointment stating he was in San Francisco recovering the rest of the money and they agreed to meet on January 6, 1975. (Tr. 205-06). Benson and Buhler then met at the Dunes Hotel, but Benson had no money although he promised to provide it later that day. (Tr. 207). Benson never met Buhler again and Buhler was never paid.

6. The Similar Act

The Government offered proof of a subsequent similar act against Kaminsky solely on the issue of Kaminsky's intent and wilfulness.

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* Prior to leaving for Las Vegas, Buhler went to the New York office of the Federal Bureau of Investigation. (Tr. 203).

Isaac Pollak, a wholesaler in the diamond business, testified that during May, 1975 a mutual acquaintance named Anthony Liewoitz introduced him to a man named "Frank Must" who was to assist him in selling large diamond bracelets and stones. (Tr. 589-90). Frank Must was identified by Pollak as the defendant Kaminsky. (Tr. 590). Pollak met with Kaminsky and Liewoitz and showed them several diamond bracelets obtained on consignment. Kaminsky said he would buy all the stones; Liewoitz gave Pollak a cash memorandum. (Tr. 594).

Thereafter, another appointment was made to settle accounts on the first sale and to show more merchandise. (Tr. 595-96). On the second occasion, Pollak gave Kaminsky several more bracelets in exchange for a cash memorandum and was told the money would be conveyed later. (Tr. 598). Arrangements were made to pay Pollak, but Kaminsky cancelled at the last moment. (Tr. 598). Two other appointments were made, but Kaminsky never appeared. (Tr. 598-99). Liewoitz later offered to retrieve a portion of the jewlery if Pollak would put up $25,000; Pollak declined the offer. After that, Pollak never saw Liewoitz or Kaminsky again. (Tr. 600).

B. The Defendant's Case

Benson offered the expert testimony of Joseph Banda, a New York diamond dealer, to impeach Buhler's explanation as to how he tried to sell the two precious stones. Banda testified about customs and practices in the diamond industry, stating that the New York office of the GIA re-examined precious stones for an additional fee, (Tr. 647-48); that the commission on the sale of a nine karat diamond would be approximately two percent, (Tr. 649); that based upon his experience, a transaction involving a $200,000 diamond would not be consummated

on a cash memorandum basis (Tr. 649); and that precious stones are generally insured by private brokers before shipment. (Tr. 651).

Mr. Crowningschield of the GIA was then recalled by Benson and testified that in June, 1974, Buhler made no request to have the 9.88 karat diamond re-examined.

None of the defendants testified.

ARGUMENT

POINT I

The Court Properly Denied The Application for a Continuance During Trial For the Purpose of Deposing Barth.

Kaminsky, Benson and Danise argue that the District Court abused its discretion in denying a request for a continuance in the middle of trial to permit the deposition of Werner Barth, a Swiss national. (Kaminsky Br. 16-26; Benson Br. 40-43; Danise Br. 29-35). Kaminsky and Danise never requested a continuance in the trial court (Tr. 487-90, 624-27), and are thus precluded from assigning the denial of a continuance as error on appeal. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966). Benson, who did raise the issue below, failed to exercise due diligence by seeking to depose Barth before the trial commenced. He also failed to make an adequate showing as to the relevancy and availability of Barth's testimony.

On cross-examination Buhler testified that he purchased the 9.88 karat diamond from a private party through a jewelry store in Zurich owned by Werner Barth.

(Tr. 331). On May 27, 1976, the following day and the fourth day of trial, counsel for Benson submitted an affidavit to the court which reported the substance of an interview of Werner Barth conducted by a private investigator. In that interview, as reported to the court by Benson's counsel, Barth stated that he never sold any 9.8 karat diamond to Buhler. (Tr. 484).* Naturally, the court suggested to Benson's counsel to "Bring him over" (Tr. 487), but Benson's counsel argued that Barth was an elderly gentleman and sought instead a five day continuance in which to depose him. (Tr. 487-88).** The court reserved decision until the Government rested. (Tr. 489).

The following day the Government stated that it called Werner Barth attempting to confirm the substance of counsel's representations. Barth refused to speak with the Assistant United States Attorney and stated that he did not want to get involved. (Tr. 624). The court denied the request for a continuance on the ground that Barth's testimony was not sufficiently inconsistent with Buhler's to warrant granting the application. (Tr. 636).

A request for a continuance is addressed to the discretion of the District Court and a denial will not be reviewed on appeal absent a clear showing that the

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* In pertinent part that affidavit provides:

"3. Mr. Barth who has been identified by Hans Heinrich Buhler, as the dealer from whom he purchased a 9.88 karat diamond in June, 1974, told my investigator the following:

"I know Buhler and I have bought and sold stones to him in the past, but I never sold him a 9.88 karat diamond or any stone of that size."

(App. 74).

** Defense counsel, whose passport had expired, stated that he would need two days to get a passport and three days to travel and to take the deposition. (Tr. 487-88).

Court's discretion was abused. *United States* v. *Frattini*, 501 F.2d 1234, 1237 (2d Cir. 1974); *United States* v. *Barrera*, 486 F.2d 333, 339 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); *United States* v. *Rosenthal*, 470 F.2d 837, 844 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *United States* v. *Coleman*, 272 F.2d 108, 110 (2d Cir. 1959); *United States* v. *Echeles*, 222 F.2d 144, 153 (7th Cir.), *cert. denied*, 350 U.S. 828 (1955). Here, the denial of the continuance was well within the proper exercise of the court's discretion.

First and foremost, Benson was not entitled to a continuance mid-trial for the purpose of deposing Barth because he failed to act diligently in his efforts to obtain Barth's deposition. Buhler testified on May 27, 1976 that he purchased the diamond through Barth's jewelry store. As counsel for Benson constructed his brief on this point, one would think that upon hearing this testimony for the first time he diligently sought to obtain a statement from Barth, producing in court on the following day information from a Swiss investigator. (Benson Br. 40-41). However, in the argument of the prior point, assigning error to the District Court's denial of a one week continuance before commencement of trial, defense counsel recites facts that demonstrate that he was on notice as to Barth's identity before Buhler testified. (Br. 32-40).

Indeed, the trial record itself reveals that counsel for Benson knew Barth's identity long before Buhler's testimony about him on May 27th. Upon cross-examination of Buhler, defense counsel utilized a transcript of a civil deposition of Buhler taken on June 11, 1975. (Tr. 319-20). In that deposition, marked for identification as Defendant's Exhibit D, Buhler identified Barth as the jeweler through whom he purchased the diamond. (Benson Br. 36). Thus, it is evident that defense counsel knew Barth's identity when he obtained a copy of the civil deposition.

The trial record and Benson's brief are both silent as to when that deposition came into defense counsel's hands.* However, since all of the defendants were parties to the civil case, it is fair to assume that the defendants shared that material before the commencement of this trial. If he had knowledge of Barth's identity before trial, the efforts during trial to interview Barth were belated efforts indeed. Furthermore, defense counsel failed to alert the District Court to the existence of this problem until long after trial commenced. In these circumstances, he was not entitled to interrupt the trial mid-course to travel to Switzerland to take a deposition.

Moreover, as the trial court twice observed, Barth's proposed testimony did not conflict with Buhler's testimony, namely that Buhler purchased the 9.88 karat diamond from a private party through Barth. (Tr. 489, 624). However, even on the more specific showing (made only after trial) that Barth would say that Buhler did not purchase through him a stone as large as the 9.88 karat diamond, the evidence was inadmissible. The purpose of this evidence was to show that Buhler lied about his ownership of the stones and that he was a jewel thief.**

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* In Benson's counsel's affidavit in connection with his post-trial motion to depose Barth, it is stated that Barth was on a vacation until May 25, 1975. However, nowhere in the record is it indicated when Barth went on that vacation and when counsel first became aware of Barth's identity.

** The defense strategy at trial was to focus the jury's attention on Buhler's possession of the 9.88 karat diamond before the scheme to defraud took place. In suggesting that Buhler had illegal posession of the jewels, defense counsel sought to prove that Buhler smuggled the two precious stones into the country. However, the defense did not need Barth's testimony in order to make this argument. The Government stipulated that Buhler did not declare the stones upon entering the United States in December, 1974. Based on that stipulation, Benson and the others forcefully argued in summation that Buhler was a smuggler and that he lied on the witness stand about ownership of the gems. (Tr. 708-09, 726-27, 740).

Extrinsic evidence of such misconduct is excluded from evidence under Rule 608(b), F.R.Evid.* Accordingly, the court properly denied the continuance on the grounds that the evidence sought was only collaterally impeaching and of doubtful admissibility. See *United States* v. *Barrera*, 486 F.2d 333, 339 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); *United States* v. *Capaldo*, 402 F.2d 821, 825 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969).

Finally, Benson did not even make an adequate showing to the trial court that the continuance would be worthwhile. Since Barth was beyond the subpoena power of the court, the court properly decided to deny the continuance when no statement was forthcoming that Barth was unable to come to New York or that Barth was willing to be deposed.** *United States* v. *Frattini*, 501 F.2d 1234, 1237 (2d Cir. 1974); *United States* v. *Tortora*, 464 F.2d 1202 (2d Cir. 1972); *United States* v. *Aiken*, 373 F.2d 294, 300 (2d Cir. 1967); *Ray* v. *United States*, 352 F.2d 521 (5th Cir. 1965).

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* The fact that Barth's testimony was collaterally impeaching distinguishes this case from *United States* v. *Dwyer*, 539 F.2d 924 (2d Cir. 1976) and *United States* v. *Robinson*, Dkt. No. 76-1177, slip op. 333 (2d Cir., Oct. 29, 1976). In *Dwyer*, this Court reversed the conviction on the ground that the exclusion of testimony from a second psychiatrist for a legal defense of insanity prejudiced the defendant's right to a fair trial. The first psychiatrist called by the defendant had failed to state that the defendant suffered from a mental disease or defect and this Court found the excluded testimony "vital" to the defense. 539 F.2d at 927. Similarly, in *Robinson*, the trial court excluded testimony vital to his defense, namely that the perpetrator of the crime looked like a person other than the defendant. *United States* v. *Robinson, supra*, slip op. at 336.

** Defendant's proper course of action would have been to apply before trial for letters rogatory pursuant to 28 U.S.C. § 1783 for the purpose of securing Barth's deposition in the absence of his consent.

POINT II

The Court's Denial of Benson's Request for a Second Continuance of the Trial Date Was a Proper Exercise of the Court's Discretion.

Benson again relies on his need for Barth's testimony in arguing that the trial court's denial of a one week continuance of the trial date was error. (Benson Br. 32-40). Although the irrelevance and doubtful admissibility of Barth's testimony makes this argument as meritless as his argument based on the denial of a mid-trial adjournment, additional procedural history is needed to set this claim in context.

Benson was a fugitive in this case up until May 7, 1976, ten days before the date that the trial was originally scheduled to commence, May 17, 1976.* When Benson appeared with counsel on May 10, 1976—a week before the previously scheduled trial date—the court granted Benson's application for a continuance, but limited it to one week instead of the two weeks which

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* On June 5, 1975 this indictment was filed and following Benson's failure to appear for pleading a bench warrant issued June 19, 1975. On April 7, 1976 Benson was arrested by the Federal Bureau of Investigation in Los Angeles, California. After posting bail Benson appeared before Honorable Charles E. Tenney in the Southern District of New York on May 7, 1976. At that time Benson, appearing without an attorney, was instructed by the court to retain one by Monday, May 10, 1976, or to have one appointed. At the time of this arraignment Benson gave his address as 315 West 57th Street, the same address to which the notice of indictment and pleading had been sent in June, 1975.

counsel sought. May 24, 1976 was set as the new trial date.*

The Government and Benson proceeded with discovery. On May 18, 1976, the Government advised all counsel of the identity of its major witnesses, Hans Buhler and Herbert Sachs.** At that time, Benson requested information concerning any possible criminal record of Hans Buhler. On May 20, 1976 a copy of Buhler's

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* The pertinent portion of that pre-trial conference is as follows:

"Mr. Epstein: I spoke to Mr. Benson, and I also spoke to Mr. Levine before court reconvened this afternoon, and I understand your Honor has tentatively set this matter down for the 24th of this month.

The Court: That is the latest I can do it. It had been set down for the 17th, and I think one week is too short a time to prepare, but I think you can prepare it in two weeks.

Mr. Epstein: What I have arranged to do, I have arranged to meet Mr. Levine tomorrow morning in his office and try to get whatever matters we can voluntarily agreed upon between ourselves.

The Court: If there is going to be any difficulty about it, I will be here, and I can straighten it out for you, straighten out any matter, but I am under so much pressure with the criminal cases, and I can't put it over more than a week on my present schedule.

Unfortunately, your client has been a fugitive for a year.

Mr. Epstein: I quite frankly had come to court this afternoon with the intention of asking your Honor whether or not it would be feasible to put this case on for the following week, June 1st. I realize it is a short week, because we do have Memorial Day that Monday.

The Court: Well, I am afraid I can't. It is not that complicated a case, to my knowledge of it." (May 10, 1976, Tr. 2-3).

** By letters dated May 18 and 19, 1976 respectively the Government advised all counsel of its intention to offer similar act evidence and to call Robert Crowningschield as a witness.

arrest record, including a report of pending investigations and character reputation, prepared by the Zurich police was made available to counsel.* (App. 63-65). Benson then renewed his application for a one week continuance to seek additional information about other cases, adverted to in the report, which were then pending against Buhler. (App. 65). Meanwhile, the Government made a request to the legal attache in Berne, Switzerland for any additional information on Buhler. (Tr. 5). On May 27, 1976, the Government advised the court and counsel of the legal attache's response to the effect that there were no other criminal proceedings pending against Buhler and no other available information. (Tr. 481).

Thus, although all of the requests for the pre-trial continuance were made on the grounds that more time was needed to obtain material about Buhler's misdeeds, on appeal the claim is shifted to the prejudice suffered by the unavailability of Barth's testimony. The reason for the shift is clear. Defense counsel was well supplied with information about Buhler's acts of misconduct and can hardly claim now that he was prejudiced by a lack of time to develop more such information.

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* Benson strenuously urges that the Government had that report in its possession at the time of this indictment and should have made it available earlier. (Benson Br. 32). Conveniently overlooked are the obvious facts that Benson was a fugitive on this indictment until May 7, 1976, counsel was not in the case until May 10, 1976 and a request for the material not made until May 18, 1976.

Also on that day Buhler was made available to all counsel for an interview, but declined to be interviewed. Benson served Buhler with a trial subpoena *duces tecum* calling for the production of certain materials on the first day of trial, May 24, 1976. (App. 62). On that date, but for certain tax returns, Buhler complied with the subpoena in all substantial respects. Benson made no claim that Buhler did not sufficiently comply with the subpoena.

Benson cannot fairly rely on Barth's unavailability in assigning error to the District Court's denial of the pre-trial continuance; this ground was never presented to Judge Tenney in any request for a pre-trial continuance. In any event, as discussed in Point I, *supra*, Barth's testimony was of doubtful admissibility and questionable availability. Accordingly, Judge Tenney could properly, in the exercise of his discretion, deny a continuance sought for the purpose of deposing Barth.

Finally, the time pressures created on Benson's counsel were of Benson's own making. The record reflects that when Benson finally appeared to be arraigned on this indictment, he gave as his home address the same address to which notice of the indictment had been sent months before. In these circumstances, Benson must assume responsibility for the late date on which his attorney entered the case and having created a situation requiring a continuance, he cannot complain that the continuance was denied. *United States* v. *Rosenthal*, 470 F.2d 837, 844 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *United States* v. *Haller*, 333 F.2d 827, 828 (2d Cir. 1964).

POINT III

The Evidence Established the Use of a Wire Communication and Inducement to Travel in Interstate and Foreign Commerce in Furtherance of the Scheme to Defraud.

Benson and Danise claim that the Government failed to prove Buhler was induced to travel in interstate and foreign commerce in furtherance of the scheme to defraud Buhler. (Benson Br. 57, Danise Br. 35). Benson also argues that the Government did not establish the use of a wire communication in furtherance of the scheme to defraud. (Benson Br. 57). Both of these arguments

hinge on the premise that the scheme to defraud was complete when Buhler relinquished possession of the two precious stones. In support of this proposition and without any distinction between the statutes, defendants lump together the convictions on Count Two for wire fraud and the convictions on Count Three for interstate transportation of stolen property and argue that the Supreme Court's decision in *United States* v. *Maze*, 414 U.S. 395 (1974), dealing with the mail fraud statute, compels that these convictions be set aside. This argument is contrary to the facts in this case and unsupported by the authorities upon which the defendants rely.

Count Two charged the defendants with transmitting and causing to transmit in interstate or foreign commerce any signals for the purpose of executing the scheme to defraud,* and Count Three charged the defendants with transporting and causing to transport, and inducing Buhler to travel in and be transported in interstate and foreign commerce in the execution of the scheme to defraud.** The court properly charged the jury that it

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* Section 1343 of Title 18, United States Code, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

** Section 2314 of Title 18, United States Code, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

must find beyond a reasonable doubt with respect to both counts that the defendants were engaged in a scheme to defraud and the respective use of wire communication for Count Two, (Tr. 788-89), and interstate and foreign travel for Count Three. (Tr. 797-98). Viewing the evidence in the light most favorable to the Government, *e.g.*, *United States* v. *Merolla*, 523 F.2d 51 (2d Cir. 1975), it is clear that the scheme to defraud was not complete until Benson failed to give Buhler the money in Las Vegas on January 6, 1975 and Buhler went to the Federal Bureau of Investigation. Necessarily essential to that scheme were the plethora of telephone calls, both interstate and foreign, between the defendants and Buhler,* the interstate travel of Buhler and Benson, and Buhler's foreign travel.**

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* With respect to Count Two the defendants used or caused to be used the telephone in interstate and foreign commerce on at least five separate days and numerous occasions: December 24, 1974, in a telephone call from Chicago to New York between Buhler and Benson in Chicago and Kaminsky and Danise in New York to confirm payment in London; December 26, 1974, in telephone calls between Buhler in London and Danise in Connecticut to assure payment in Zurich; December 28, and 30, 1974 and January 1, 1975, in telephone calls between Buhler in Zurich and Danise and Kaminsky in New York to persuade Buhler to return to New York for payment; January 3 and 4, 1975, in telephone calls between Benson in Las Vegas and Danise, Kaminsky and Buhler in New York to induce Buhler to go to Las Vegas for his money and finally, on January 5, 1975 in a telephone call between Buhler in Las Vegas and Danise in New York to assure Buhler the money was available. Given the scheme to defraud, described earlier, each of these telephone calls was proved to be in furtherance of the scheme.

** With respect to Count Three, Benson traveled to Chicago on December 23, 1974 and Buhler traveled in interstate and foreign commerce on at least three occasions: on December 23, 1974 when Buhler traveled to Chicago with Benson to be paid on the day of the ostensible sale; on January 2, 1975 when Buhler returned to New York from Zurich on Danise's representation that

[Footnote continued on following page]

Defendants attempt to fit this case within the limitations set by *United States* v. *Maze*, *supra*. First, it must be noted that this Circuit has not decided whether *United States* v. *Maze*, *supra*, a case involving the mail fraud statute, § 1341, applies to § 1343 or § 2314. Inasmuch as the use of the wires under the wire fraud statute is merely "a ground for federal jurisdiction," *United States* v. *Biassingame*, 427 F.2d 329, 330 (2d Cir. 1970), the application of *Maze* to § 1343 is unlikely.* Similarly, the Seventh and Ninth Circuits have held that *United States* v. *Maze*, *supra*, does not apply to certain paragraphs of § 2314 on the ground that the interstate element of that statute is only a jurisdictional requirement. *United States* v. *Willis*, 528 F.2d 381 (9th Cir. 1976); *United States* v. *Gundersen*, 518 F.2d 960 (9th Cir. 1975); *United States* v. *Johnson*, 504 F.2d 622, 627 (7th Cir. 1974).

However, even if the theory underlying *United States* v. *Maze*, *supra*, were to apply to this case, the use of the telephone between the defendants and [illegible], the interstate travel of Benson and Buhler, and [illegible] foreign travel of Buhler were clearly in furtherance of the execution of that scheme as required by the logic of that decision. *Maze* indicated that mailings subsequent to the fraud would meet the statute's requirement if they were in-

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she had the money in her hands; and on January 4, 1975 when Buhler flew to Las Vegas to meet Benson who had posted the gems for a gambling loss.

* In *United States* v. *Owen*, 492 F.2d 1100, 1103 (5th Cir.), *cert. denied*, 419 U.S. 965 (1974), the Fifth Circuit reviewed a conviction under multiple counts of §§ 1341 and 1343 in the context of *United States* v. *Maze*, *supra*, but did not specifically hold that *Maze* applied to § 1343.

tended to "lull the victims [of the fraud] into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." *United States* v. *Maze*, *supra*, 414 U.S. at 403. See *United States* v. *Sampson*, 371 U.S. 75 (1962); *United States* v. *Marando*, 504 F.2d 126, 130 (2d Cir.), *cert. denied sub nom Berardelli* v. *United States*, 419 U.S. 1000 (1974); *United States* v. *Vanderpool*, 528 F.2d 1205 (4th Cir. 1975); *United States* v. *MacClain*, 501 F.2d 1006, 1011-1012 (10th Cir. 1974). All of those factors were operative here. Viewed in the context of the whole scheme, the interstate and transatlantic telephone calls and travels were essential to the successful completion of the scheme to defraud and met the statutes' requirements.

POINT IV

The Government Adequately Proved Count Three of the Indictment And Any Variance Did Not Prejudice Danise.

Danise also argues that her conviction on Count Three for inducing Buhler to travel in interstate and foreign commerce should be reversed was in concealment, rather than in execution, of the scheme to defraud under § 2314.*

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* Section 2314 of Title 18, United States Code, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

(Danise Br. 35). Danise correctly notes that Count Three of the indictment charged the defendants under § 2314 with the inducement of interstate travel in the execution of the scheme to defraud * and not, as provided in the disjunctive in the statute, with the concealment of the scheme to defraud. However, the crime was adequately charged and Danise suffered no prejudice from any variance between the indictment and the proof.

At the outset, it may fairly be argued that Buhler's travel in interstate and foreign commerce was induced in "execution" of the scheme to defraud. It is hardly plausible that travel induced immediately upon the taking of property by fraud is not within the meaning of the phrase "in execution . . . of a scheme . . . to defraud." ** The phrase "in execution," given its common meaning should encompass travel induced before, during or after the taking of the property, as long as it is in furtherance of the scheme to defraud.

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* Count Three charged as follows:

"The Grand Jury further charges:

From on or about the 23rd day of December, 1974, up to and including the date of the filing of this indictment, in the Southern District of New York, Harry Levine Benson, Herbert Kaminsky, and Mari-Ann Danise, the defendants, having devised a scheme and artifice for obtaining the property of Hans Buhler, to wit, two gems having an aggregate value in excess of $200,000.00, by means of false and fraudulent promises and representations, did induce the said Hans Buhler to travel in interstate and foreign commerce in the execution of said scheme."

** The mail fraud statute encompasses subsequent mailings within its terminology, "for the purpose of executing such scheme." *United States* v. *Maze, supra; United States* v. *Sampson, supra.*

However, even assuming that the interpretation suggested by the defendant were adopted and any travel occurring after the taking of the property must be charged only under the concealment language of the statute, at most Danise is claiming that there was a variance between the indictment, charging "execution" and the proof, which established travel for purposes of concealment of the fraud. However, Danise never moved before the trial court for dismissal on grounds of material variance. Moreover, even if the point had been properly preserved for review on appeal, the question would be whether Danise was "so prejudiced by the variance as to be entitled to a reversal of her conviction." *United States* v. *Bertolotti*, 529 F.2d 149, 155 (2d Cir. 1975). Accord, *Berger* v. *United States*, 295 U.S. 78, 81-84 (1935); *United States* v. *Sir Kue Chin*, 534 F.2d 1032, 1035 (2d Cir. 1976); *United States* v. *Agueci*, 310 F.2d 817, 827 (2d Cir. 1962).

It is clear there was no prejudicial variance here. Although the indictment did not allege the travel to be in "concealment" of the scheme to defraud, there was no doubt that the travel which the Government was charging included travel induced after the diamond was conveyed to the defendants. Thus, the overt acts charged in the conspiracy count included the Buhler-Benson trip on December 23, 1974. In addition, the overt acts alleged the Buhler-Danise telephone calls between Zurich and New York from December 31, 1974 through January 3, 1975. Therefore, the defendants clearly had notice that the Government's proof would include acts committed after Buhler relinquished possession of the 9.88 karat diamond on December 23, 1974. Whether the Government charged the interstate travel induced here to be in

concealment of the scheme, as Danise urges it should have, or in execution of the scheme, as the indictment charged, or in the conjunctive, as the Government could have properly done, the proof at trial would have included the same acts.

In *United States* v. *Schwartz*, 150 F.2d 627 (2d Cir.), *cert. denied*, 326 U.S. 757 (1945), this Court faced an identical situation under an earlier version of this statute and found the defendant not prejudiced by a difference between the indictment and proof. In *Schwartz* the indictment charged the defendants with the larceny of whiskey moving in foreign commerce under a statute proscribing larceny of goods moving in both foreign and interstate commerce. The defendant claimed the proof showed only movement in interstate commerce, not foreign commerce as charged in the indictment. On appeal the defendant urged that the trial court should have directed a judgment of acquittal. Rejecting the claim this Court stated:

> "If the whiskey, when stolen was not moving in foreign commerce, it was clearly moving in interstate commerce; and the same statute covers either situation. The indictment completely described the facts which made up the charges against the defendants and the variance between the allegation that the whiskey was "moving as a part of a foreign shipment of freight" and the proof that it was part of an interstate shipment could not possibly have surprised or misled the appellant." 150 F.2d at 628.

Accord, *United States* v. *Thomas*, 396 F.2d 310, 315 (2d Cir. 1968); *United States* v. *Fassoulis*, 293 F.2d 243, 245 (2d Cir. 1961).

As in *Schwartz*, the evidence here adequately supported the indictment, as well as that portion of the statute Danise claims should have been charged. Accordingly, any variance between the indictment and proof has not prejudiced her right to a fair trial and does not require reversal.

POINT V

The Nature Of The Victim's Interest In The Property Obtained In A Scheme To Defraud Is Not An Element Of §§ 1343 and 2314.

Kaminsky and Benson contend that the Government was required to prove beyond a reasonable doubt that Buhler owned the precious stones in order to sustain the convictions on Counts Two and Three. This argument is frivolous.

The defendants make much of the fact that the Government argued and offered proof that Buhler was the true owner of the stones. However, the Government's decision to deal with the issue at trial hardly elevates it to a necessary element of the crime. The Government's purpose in even raising the question was to meet the expected defense strategy of painting Buhler as a rogue, thief and smuggler. Therefore, to meet the argument squarely, the Government in its opening stated that it would show that Buhler was the legitimate owner of the two precious stones. (Tr. 90). As expected, much of Buhler's cross-examination related to this issue. After the Government stipulated that Buhler did not declare the two precious stones upon his entry into the United States in December, 1974, even though Buhler testified that he declared $100,000 worth of valuable items, the defendants forcefully argued to the jury that Buhler was

a smuggler. On the other hand, the Government argued in summation that the evidence showed that Buhler was the legitimate owner of the two precious stones. (Tr. 689-91).

On appeal, defendants Kaminsky and Benson twist this psychological jury issue into a legal claim that Buhler's legitimate ownership was an element of the crimes charged. However, the nature of the victim's interest in the property obtained in a scheme to defraud need not be established as an element of a crime charged under either § 1343 or § 2314.

The essential elements of wire fraud, the offense defined in section 1343, are (1) a scheme conceived by the defendant for the purpose of defrauding someone of property by means of false pretenses, representations and promises, and (2) use of the telephone or other wire communication in interstate or foreign commerce for the purpose of executing the scheme. *United States* v. *Andreadis*, 366 F.2d 423 (2d Cir. 1966). The specific elements of the relevant paragraph of section 2314 are (1) a scheme to defraud, (2) defrauding someone of property valued at more than $5,000, and (3) inducement of an individual to travel in interstate or foreign commerce in the execution of the scheme. *See United States* v. *Crisona*, 416 F.2d 107 (2d Cir. 1969). Those are the elements of each crime the trial court charged jury it must find.

If the defendants' attorneys believed that as a matter of law the Government was also required to prove Buhler's legitimate ownership of the gems, they did not alert the District Court to their expectation that the jury would be so charged. No request to charge was submitted by any of the defendants that the jury must find Buhler owned the two precious stones in order to convict. The

trial court did not charge the jury at all on this subject of Buhler's ownership of the gems. The defendants made no objection to this charge on the issue by the court.

While no case has specifically held in this Circuit that the nature of the victim's interest in the property defrauded from him is immaterial to either crime charged here, no other holding is possible taking together the relevant interpretations of these statutes. The law is well-settled that the *mens rea* of a crime which charges engaging in a scheme to defraud is unrelated to the nature of the property obtained. As this Court stated in *United States* v. *Regent Office Supply Company*, 421 F.2d 1174, 1180-81 (2d Cir. 1970):

> "Proof that someone was actually defrauded is unnecessary simply because the critical element in a 'scheme to defraud' is 'fraudulent intent,' *Durland* v. *United States*, 161 U.S. 306, 16 S.Ct. 508, 40 L. Ed. 709 (1896), and therefore the accused need not have succeeded in his scheme to be guilty of the crime. *E.g.*, *Pritchard* v. *United States*, 386 F.2d 760 (8th Cir. 1967); *Adjmi* v. *United States*, 346 F.2d 654 (5th Cir. 1965). But the purpose of the scheme 'must be to injure, which doubtless may be inferred when the scheme has such effect as a necessary result of carrying it out.' *Horman* v. *United States*, 116 F. 350, 352 (6th Cir. 1902). Of course proof that someone was actually victimized by the fraud is good evidence of the schemer's intent."

Thus, at least in mail fraud and wire fraud prosecutions it is not necessary to allege or to prove that the victim was in fact defrauded. *Pereira* v. *United States*, 347 U.S. 1 (1954); *United States* v. *Andreadis*, 366 F.2d 423, 431 (2d Cir. 1966); *United States* v. *Whiting*, 308

F.2d 537, 540 (2d Cir. 1962), *cert. denied*, 372 U.S. 909 (1963). It is similarly well-established that the financial loss of the victim is unnecessary to conviction under the wire fraud statute. See *United States* v. *Pollack*, 534 F.2d 964, 971 (D.C. Cir. 1976) (Lumbard, J., sitting by designation); *Shale* v. *United States*, 388 F.2d 616, 618 (5th Cir.), *cert. denied*, 393 U.S. 984 (1968); *Brandon* v. *United States*, 382 F.2d 607, 610 (10th Cir. 1967); *Farrell* v. *United States*, 321 F.2d 409, 419 (9th Cir. 1963); *Wine* v. *United States*, 260 F. 911, 914 (8th Cir. 1919). Implicit in defendants' claim that Buhler's ownership is an element of these crimes is the assumption that as a result of the scheme to defraud a victim must suffer a financial loss. Since the suffering of a loss is immaterial, the nature of his ownership must similarly be immaterial.

With respect to § 2314, defendants rely on *United States* v. *Handler*, 142 F.2d 351, 353 (2d Cir.), *cert. denied*, 323 U.S. 741 (1944) to support the proposition that an essential element of § 2314 is rightful ownership of property by the victim. However, *United States* v. *Handler* involved a prosecution under the precursor statute of the first paragraph of section 2314.* That section was amended in 1948.** Presently under that section and

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* The relevant portion of the statute provided:

"Whoever shall transport or cause to be transported in interstate or foreign commerce any . . . money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, . . . shall be punished . . ." 18 U.S.C. § 415 (1939).

In *United States* v. *Handler*, *supra*, this Court interpreted the words "with intent to steal and purloin" as applied to the defendant's taking of the victim's bond and not the language "taken feloniously by fraud.

** Section 2314 now provides in pertinent part:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud."

other sections of Chapter 113 of Title 18, U.S.C. § 2311 et seq., which proscribe that the property obtained and taken interstate must be stolen, the Government must show that the defendant knew that the property obtained was stolen. No such element of proof is required in the fraud statutes, 18 U.S.C. §§ 1341 and 1343.

Nor is the nature of the unlawful act which constitutes a crime in the second paragraph of § 2314 similar to those in other paragraphs of § 2314. The congressional history for the amendment of § 2314 to include this paragraph, erroneously relied upon by defendants, supports the Government's interpretation. It states that the need for this section arises in part because § 1341, the mail fraud statute, does not cover frauds when mails are not used.* Since the incorporated language in § 2314 is the same as the mail fraud statute, at least insofar as the victim's property interest is concerned, the interpretation of the two sections ought to be consistent. Clearly, any departure from the interpretation of that similar language would have been articulated by Congress.

Since the nature of the victim's interest in property defrauded is not an element of either § 1343 or § 2314, the question of whether Buhler owned these two precious stones was a jury issue only. Both sides vigorously argued to the jury about Buhler's ownership of the gems.

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* The relevant portion of the congressional history provides:

> In combating this sort of criminal activity, the Department of Justice has found that our present Federal laws are inadequate when it comes to dealing with the criminal who utilizes travel by the victim in the perpetration of the scheme to defraud that individual of his money. Such criminals avoid prosecution under the mail fraud statutes (Sec. 1341 U.S.C., Title 18) by not using the mails. 2 U.S. Code Admin. News 3038 (1956).

(Eg., Tr. 689-93, 708-09, 726-27, 740). This issue, although contested before the jury, is from a legal standpoint collateral to the defendants' guilt, and does not create a basis for reversing their convictions.

POINT VI

Proof Of A Subsequent Similar Act Was Properly Admitted Against Kaminsky.

Kaminsky contends that the trial court erred in permitting the introduction of evidence that after the events charged in this indictment Kaminsky used a similar scheme to obtain $150,000 worth of jewelry. The trial court ruled that this evidence was admissible to show Kaminsky's intent and wilfullness. (Tr. 408). The court instructed the jury to this effect at the time the evidence was offered (Tr. 586-588), and again in its charge to the jury. (Tr. 807). The admission of the evidence was entirely proper.

Issac Pollak, an employee of Jewel Box Stores in New York, testified that on two occasions in May, 1975 he delivered diamond bracelets valued at approximately $150,000 to a man named Frank Must. Pollak identified Frank Must as the defendant Kaminsky. (Tr. 590). On each occasion Pollak testified he gave the diamond bracelets to Kaminsky in exchange for a cash memorandum for Kaminsky's appraisal and inspection. When Pollak pressed for payment Kaminsky made appointments and broke them. Shortly thereafter Kaminsky disappeared.

As this Court stated in *United States* v. *Miranda*, 526 F.2d 1319, 1331 (2d Cir. 1975), a case involving subsequent similar acts, "[i]t is settled law in this Circuit that evidence of similar acts, including other crimes,

is admissible when it is substantially relevant for a purpose other than merely to show defendant's criminal character." *Accord*, *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975); *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967); *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966); *United States* v. *Marchisio*, 344 F.2d 653, 667 n.11 (2d Cir. 1965).

The evidence of the subsequent similar acts was clearly probative of Kaminsky's intent and wilfullness. F.R. Evid. 404(b). The gist of the crime charged was a scheme to defraud a jeweler of precious stones by obtaining precious stones in exchange for a cash memorandum in an ostensibly legitimate business transaction, but without any intention of returning the precious stones or paying for them. With both Buhler and Pollak, Kaminsky took advantage of the recognized custom in the diamond industry of transferring precious stones on a cash memorandum receipt. From Pollak's testimony the jury could have inferred that Kaminsky was not a legitimate businessman engaged in a transaction that somehow went awry, and thus, established Kaminsky intentionally and wilfully defrauded Buhler of the two precious stones.

Kaminsky argues that the admissibility of the Pollak transactions as similar acts was error because (1) Kaminsky's intent was not in issue; (2) the transactions were not similar to the defrauding of Buhler proved at trial; and (3) the trial court failed to instruct the jury that Kaminsky had not been convicted of the similar act. First, Kaminsky's claim that intent was not in issue overlooks the fact that intent may be placed before the jury as an issue by the nature of the facts proved by the Government, as well as by facts sought to be established by the defense. *United States* v. *DeCicco*, 435 F.2d 478,

483 (2d Cir. 1970); *United States* v. *Smith*, 283 F.2d 760, 763 (2d Cir. 1960), *cert. denied*, 365 U.S. 851 (1961). Unlike *DeCicco*, relied upon by defendant, the nature of the Government's case presented the jury with the question of whether this was a commercial transaction gone awry or a scheme to defraud.* As this Court stated in *United States* v. *Papadakis*, *supra*: "A larceny by trick and device would, on the other hand, admit such proof, for in that case, the alleged criminal act having been proved the issue still to be proved was intent. . . . [I]t was only right for the jury to know that it was [defendant's] practice to commit what appeared to be innocent acts with intent to defraud." 510 F.2d at 294.

Second, the evidence of the Pollak transactions related to activities which were both closely related in time and subject matter to the crimes charged in the indictment. *United States* v. *Byrd*, 352 F.2d 570, 574-75 (2d Cir. 1965).** The gist of both the Buhler and Pollak transactions was a scheme to defraud based on the diamond industry's legitimate use of a cash memorandum receipt in which precious stones here were obtained without any intention of transferring funds. Thus, the trial court could properly find the two transactions similar, and it

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* In balancing the probative value of the testimony against its prejudicial effect on the defendants, this Court in *DeCicco* was necessarily persuaded by other prejudicial references in the record to the defendants as a "band of art treasure thieves." 435 F.2d at 482, 484. No such comments were made here.

** Relying on *United States* v. *Broadway*, 477 F.2d 992 (5th Cir. 1973), Kaminsky also claims that since there was no evidence of interstate travel by Pollak the similar act was inadmissible. In *United States* v. *Broadway*, *supra*, the Fifth Circuit specifically adopted the Eighth Circuit rule that similar act evidence must be "plain, clear and conclusive." See *Kraft* v. *United States*, 238 F.2d 794, 802 (8th Cir. 1956). However, that rule and the principle relied upon by Kaminsky were rejected by this Court in *United States* v. *Leonard*, 524 F.2d 1076, 1090-91 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3624 (U.S., May 3, 1976).

is well-settled that the admissibility of similar act evidence is within the broad discretion of the trial judge whose decision will rarely be disturbed on appeal. *United States* v. *Leonard*, 524 F.2d 1076, 1091 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3624 (U.S., May 3, 1976).

Finally, Kaminsky claims as error the trial court's failure to charge the jury that Kaminsky had not been charged or convicted for the Pollak similar act. The argument, well taken in *Pilcher* v. *United States*, 113 F. 248, 249 (5th Cir. 1902) on which Kaminsky relies, has no applicability here. In *Pilcher*, the defendant had been acquitted in a trial involving the similar act, a claim which Kaminsky cannot assert in this case. Accordingly, the charge requested here—to the effect that he had not been convicted of the similar act—was plainly unnecessary. Moreover, when the court did not give the requested instruction, no objection was taken as is required by Rule 30, F.R. Crim. P.; *United States* v. *Pastore*, 537 F.2d 675, 678 (2d Cir. 1976); *United States* v. *Indiviglio*, 352 F.2d 276, 279-80 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

POINT VII

There Was No Error In The Admission Of The Handwritten Notations On Buhler's Bank Draft.

Danise claims as error the trial court's ruling admitting into evidence Buhler's handwritten notations on a bank advice used to purchase the 9.88 karat diamond. (GX 4). The bank advice contained a handwritten notation by Buhler with the words: "Barth-DI/9.90" and was received in evidence, over defendant Benson's objection

that it was not a business record.* No objection was made by Danise in the trial court below. Having failed to make an objection before the trial court, Danise's present claim is reviewable only for plain error. *United States* v. *Dozier*, 522 F.2d 224, 228 (2d Cir.), *cert. denied*, 423 U.S. 1021 (1975); *United States* v. *Projansky*, 465 F.2d 123, 125 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States* v. *Indiviglio*, 352 F.2d 276, 279-80 (2d Cir. 1965), (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

Even had an objection been taken which preserved the issue for this appeal, it is clear that the document's notation was admissible and there was no error. The main policy underlying the hearsay rule is to protect the party against whom the statement is being offered by

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* The relevant portion of the transcript provides:

"Q. Showing you what has been marked Government's Exhibit 4, can you identify it? A. That is the Bank at Weiss (sic) which I bought a cashier's check.

Q. Is that used to pay for the purchase of the diamond? A. Yes.

Mr. Epstein: Your Honor, on behalf of defendant Benson as to Government's Exhibit 4, I would object to its receipt in evidence.

The Court: Overruled.

Mr. Epstein: Your Honor will see that in addition to the typing which is done in a foreign language, which I assume is germane, there is also handwriting on there which I don't believe is any business record and——

The Court: We will have the handwriting identified. Otherwise it will be received with or without the handwriting.

Q. Mr. Buhler, is the handwriting on the document yours? A. Yes.

Mr. Levine: Offered as Government's Exhibit 4.

The Court: Received.

(Government's Exhibit 4 was received in evidence)." (Tr. 119-20).

giving him an opportunity to confront the person making the statement. *Pointer* v. *Texas*, 380 U.S. 400, 406 (1965). Buhler, the author of the note, was available for cross-examination. In such circumstances, the reliability of the notation can be fully tested. *United States* v. *Bennett*, 409 F.2d 888, 894-95 (2d Cir.), *cert. denied*, 396 U.S. 949 (1969); *United States* v. *Marchisio*, 344 F.2d 653, 670 (2d Cir. 1965); see *California* v. *Green*, 399 U.S. 149, 154-55 (1969). Even though Danise's counsel had a full opportunity to cross-examine Buhler about the notation, counsel did not ask Buhler a single question on the subject.* Having failed first to object to the admission of the notation and then having failed to take the opportunity to cross-examine Buhler about the notation, Danise cannot claim on appeal that she was prejudiced by admission of this hearsay.

Moreover, the prejudice from admission of the notation has been vastly overstated in Danise's brief. Thus, defendant claims that the Government "relied heavily on this document as proof independent . . . that Buhler owned the gem." (Danise Br. 27). However, this misstates the record. In summation the Government stated that six documents, including the bank advice, supported Buhler's testimony that he owned the two precious stones. (Tr. 690-93). The handwritten notation was only mentioned specifically in argument to the jury in the following way:

> ". . . on cross examination you heard Buhler identify the penciled writing on that document as his own, and tell defense counsel that 'D.I.' stood for diamond and 9.90 was the karat and the 510 francs was what was spent for that diamond." (Tr. 690).

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* On cross-examination of Buhler, Benson's counsel explored the notation on the bank advice. (Tr. 507-09).

This argument did no more than point out Buhler's testimony about the notation, testimony elicited not by the Government but by defense counsel.

In any event, Buhler's notation on the bank advice, was merely a prior consistent statement corroborating his testimony that he purchased the 9.88 karat diamond for 510,000 Swiss francs through Barth. In cross-examination of Buhler and in summation defendants persistently charged that Buhler had fabricated this story.* This Court has approved of the admissibility of a prior consistent statement to refute a charge of recent fabrication. *United States* v. *Dorfman*, 470 F.2d 246, 248 (2d Cir. 1972), *cert. denied*, 411 U.S. 923 (1973); *United States* v. *Zito*, 467 F.2d 1401, 1403 (2d Cir. 1972).**

Finally, this is a far different case than was presented in *United States* v. *Frattini*, 501 F.2d 1234 (2d Cir. 1974), on which Danise heavily relies. In *Frattini*, a narcotics case, the handwritten notation constituted "speculation" as to what an agent learned from some other source and constituted the *only* evidence of possession of narcotics by the defendant against whom it was offered. 501 F.2d at 1236. Here the evidence was Buhler's own statement, not speculation derived from other unidentified sources. Moreover, the notation was cumulative, corroborating other evidence offered on the issue of Buhler's ownership, which was not, in any event, an issue going directly to the guilt or innocence of these defendants.

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* Even though the document was in evidence before the cross-examination of Buhler developed this point, the Government only mentioned the notation in summation. (Tr. 690).

** Neither defense counsel nor the Government requested a limiting instruction. *United States* v. *Zeehandelaar*, 498 F.2d 352, 357 (2d Cir. 1974).

POINT VIII

There Was No Error In The Court's Quashing Of Benson's Subpoena Issued To The Bureau of Customs.

Benson also claims it was error for the court to quash a subpoena *duces tecum* served at the conclusion of the trial on the United States Bureau of Customs for documents relating to Hans Buhler. The argument is without merit.

On May 28, 1976 the last day of trial testimony and the day after Buhler finished testifying, Benson advised the court that on the previous day he had served a subpoena on the United States Bureau of Customs for documents maintained by that agency relating to Buhler and for customs declaration documents executed by Buhler upon his entry into the United States in June and December, 1974. (Tr. 619-24). With respect to the customs declaration, the Government offered to stipulate that Buhler did not declare the two precious stones upon entering the United States in December, 1974. (Tr. 620). With respect to the subpoena for the June, 1974 customs declaration of Buhler, Benson had made no prior request for it and the court quashed the subpoena. (Tr. 621).* The Government refused to stipulate to the existence of any customs declaration for Buhler's trip in June, 1974. With respect to that part of the subpoena seeking any files concerning Buhler, the Court found the subpoena untimely and quashed it. (Tr. 622).

On the morning of summations, the Government announced to the jury that the Government and the defendants stipulated that Buhler did not declare the stones

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* The court recognizing the Government had no obligation to produce the customs declaration for a trip six months before the scheme proved here stated: "He can if he wants. I think you've got it all." (Tr. 621).

in December, 1974. (Tr. 664).* Although Benson's attorney previously stated his preference for having a telex stating that there was no customs declaration by Buhler in December 1974, when the telex failed to arrive in time, he did not object to the stipulation. (Tr. 664).

The subpoena *duces tecum* confronted the trial court with an attempt to obtain additional discovery about a witness after that witness' testimony was concluded and on the day prior to summations and charge. It is settled that "a subpoena *duces tecum* in a criminal action is not intended for the purpose of discovery." *United States* v. *Marchisio*, 344 F.2d 653, 669 (2d Cir. 1965). *Accord*, *United States* v. *Purin*, 486 F.2d 1363, 1368 (2d Cir.), *cert. denied*, 416 U.S. 987 (1974).

Moreover, as Judge Tenney noted, defense counsel was trying to conduct this discovery during the course of the trial. No explanation was given for defense counsel's lack of due diligence and inability to subpoena such documents at the proper time prior to trial. In addition, since the subpoena was not issued until Buhler's testimony concluded, the documents obtained could not be used for his cross-examination and absent that use, there was no conceivable explanation for the subpoena's relevance. In such circumstances, where the documents sought are not relevant and admissible, this Court has held that the trial judge may refuse to order the production of the documents. *United States* v. *Purin*, *supra*; *United States* v. *Marchisio*, *supra*.

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* To support his position that a customs declaration was not prepared by Buhler in December, 1974 Benson claims that "subsequent discovery [shows] that the witness's [sic] Los Angeles Customs declaration was prepared by his father and not in December, 1974." (Benson Br. 47). That fact, however, is not contained in the record and should not be used on appeal.

Finally, the trial court found that the Government had acted in good faith in discharging its discovery obligations under *Brady* and 18 U.S.C. § 3500. No claim to the contrary is made here. Absent such bad faith, the trial court may properly quash a defendant's subpoena *duces tecum* for additional discovery materials served at the conclusion of the trial. *United States* v. *Reyes-Padron*, Dkt. No. 75-1427, slip. op. 4757, 4761-62 (2d Cir. July 2, 1976).

POINT IX

The District Court Properly Charged As To Credibility Of Witnesses And Correctly Denied A Charge As To Negative Inferences To Be Drawn From False Testimony.

Benson claims that the court failed to charge the jury on the negative inferences that could be drawn from Buhler's testimony and thereby denied him a fair trial. (Benson Br. 48-52). Although the point is pressed now, Benson failed to preserve the issue adequately in the court below. Prior to summation and charge, Benson submitted among his requests to charge a request on the negative inferences that may be drawn for false testimony.* The Government requested the court's standard

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* Benson's request to charge reads as follows:

"In considering the evidence in this case you must consider the carriage, behavior, bearing, manner and appearance of a witness. The words used by a witness are by no means all that we are to rely on in making up our minds about the truth of the matter before us. The jury may and indeed should take into consideration the whole nexus of sense impressions which they get from a witness. Moreover such evidence as the hearing and manner of a witness may well satisfy you not only that the witness

[Footnote continued on following page]

charge on the credibility of witnesses. The court stated the defendant's request would be charged in substance, (Tr. 666), and then charged the jury, as fully set forth below, on the credibility of witnesses, including the charge that all the testimony of a witness may be disregarded if the jury finds that a witness has testified falsely about any material matter.* Following the court's charge, Ben-

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testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance as to give assurance that the witness is fabricating and that if he is, there is no alternative but to assume the truth of what he denies, *Dyer* v. *MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952)."

* The pertinent portion of the court's charge:

"Now I want to talk to you very briefly about the credibility or believeability of witnesses.

You are the sole judges of the credibility or truthfulness of each witness in this case. In weighing the testimony of each witness, you should consider his relationship to the government or to the defendant, the extent of the witness' interest, if any, in the outcome of the case, his manner of testifying, his appearance and conduct while on the stand, his intelligence, the strength or weakness of his recollection, and the extent of (sic) which he has been corroborated or contradicted, if at all, by the other credible evidence.

The ultimate question for you to decide in passing upon the credibility of a witness is "did the witness tell the truth;" and to this end, you are to use your everyday common sense.

If you find that any witness has deliberately testified falsely to any material fact, you may disregard all of his testimony or you may accept that part of his testimony which you believe is truthful, or which you find to be corroborated or supported by other evidence in the case.

* * * * *

If a witness is shown to be knowingly testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves. (Tr. 804-06).

son objected to several specific portions of the charge, but raised no objection to the portion of the charge challenged here.* Thus, having failed to make a proper objection before the trial court, Benson's present objection to the charge is reviewable only for plain error.** F. R. Crim. P. 30, 52(b); *United States* v. *Magnano*, Dkt. No. 76-1011, slip. op. 5471, 5477 (2d Cir. Sept. 7, 1976); *United States* v. *Pastore*, 537 F.2d 675, 678 (2d Cir. 1976); *United States* v. *Santiago*, 528 F.2d 1130,

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* Defendant Benson's exceptions to the charge were as follows:

"The Court: Any exceptions?

Mr. Epstein: Defendant Benson takes exception to the court's charge on conspiracy; that one can conspire to commit either a criminal act, an offense against the United States or an illegal association to do an unlawful act.

It is the defendant Benson's contention that one can only be held accountable for a conspiracy to commit a crime pursuant to 18 U.S.C. § 371.

The defendant Benson takes exception to the Court's charge that certain inferences can be drawn from one's acts and conduct. These acts all require a specific intent and therefore the jury should not be charged as to what inferences can be drawn merely from acts and conduct, Court of Appeals in *United States* v. *Bertolotti*, 529 F.2d

Defendant Benson also takes exception to your Honors charge on the availability of certain witnesses." (Tr. 812-813).

** Benson makes no claim that his objection to the charge was sufficiently preserved for review on appeal by virtue of the submission of his requests to charge. In any event, such an argument contravenes the clear import of Rule 30 of the F. R. Crim. P., which requires an explicit objection to the charge "before the jury retires to consider its verdict." In *United States* v. *Sherman*, 171 F.2d 619 (2d Cir. 1948), *cert. denied*, 337 U.S. 931 (1949), this Court stated that defendant's non-compliance with Rule 30 precluded review for error. See also *United States* v. *Leach*, 417 F.2d 1107, 1113 & n.6 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970) (a defendant must register his objections to the charge after its delivery, even if a request was submitted and denied prior to the charge).

1135 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3659 (U.S. May 19, 1976); *United States* v. *Dozier*, 522 F.2d 224, 228 (2d Cir.), *cert. denied*, 423 U.S. 1021 (1975); *United States* v. *Pravato*, 505 F.2d 703, 704-05 (2d Cir. 1974); *United States* v. *Indiviglio*, 352 F.2d 276, 279-80 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

Even if Benson had properly objected to the court's charge, there would be no grounds for reversal in this case. In *United States* v. *Jenkins*, 510 F.2d 495 (2d Cir. 1975), the defendant requested a similar instruction to that sought here in order to dissipate two postal inspectors' testimony about the defendant's confession. The trial court rejected the charge requested and explicitly charged to the contrary stating that a negative inference may not be drawn from a witness' testimony unless there is other evidence to that effect. Following conviction, the defendant claimed that charge to be erroneous. This Court then stated:

> "Given the Government's burden of proving guilt beyond a reasonable doubt, it is highly dubious that a jury which found guilt could simultaneously have disbelieved the Government witness upon whose word the prosecutorial value of the defendant's confession would rise or fall." 510 F.2d at 499.

As in *United States* v. *Jenkins*, *supra*, it is hard to comprehend the need for a charge on negative inferences here. Had the jury disbelieved Buhler, the court's charge permitted the jury to reject his testimony in whole or in part. If Buhler's testimony were rejected, an acquittal would have resulted. Thus, obtaining an acquittal did not require that the jury infer the opposite of Buhler's testimony; it required only that the jury reject his testimony. Accordingly, the failure to give the requested

charge can hardly amount to error, and surely not the plain error that Benson would have to demonstrate to succeed on this issue.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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ALAN LEVINE,
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Assistant United States Attorneys, Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Alan Levine being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 6th day of December, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Phylis Skloot Bamberger
Federal Defenders' Service Unit
U.S. Courthouse
Foley Square
N.Y., N.Y. 10007

Gretchen White Oberman
299 Broadway
N.Y., N.Y. 10007

Gilbert Epstein
100 Church Street
N.Y., N.Y. 10007

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Alan Levine

Sworn to before me this
6th day of December 1976

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977